THE

Sri Lanka Law Reports

**Containing cases and other matters decided by the**

**Supreme Court and the Court of Appeal of the**

**Democratic Socialist Republic of Sri Lanka**

**[2011] 1 SRI L.R. - PART 10**

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*Kusumadasa Vs. State*

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be convicted for the offence. Further if the proved facts are

not consistent with the guilt of the accused he cannot be

convicted for the offence. This view is supported by the

judgment of Dias J in *Podisingho Vs King*(3) wherein His

Lordship held thus: “That in a case of circumstantial

evidence it is the duty of the trial Judge-to tell the jury that

such evidence must be totally inconsistent with the

innocence of the accused and must only be consistent with

his guilt.” On the above ground alone the appellant should be

acquitted.

**Finding a *Kuppiya* (small bottle) with some substance**

**near the dead body.**

P.S Wiesinghe who, on information received from Anura

Kumara, the Grama Sevaka of the area, went to the place

where the dead body was lying fallen, on 26.4.94 around

9.45 p.m. but could not make observation due to the lack of

light. Around 6.30.a.m. on the following day he observed a

kuppiya (a small bottle) with some substance near the dead

body. He could not say anything about the substance found

inside the bottle. No one can say that this kuppiya is a can.

The deceased had taken a can marked P2 when she left for

Adam’s Peak. The mother of the deceased had identifed this

can. The small bottle (kuppiya) found near the dead body is

not this can. Needless to say that there is a big difference

between a kuppiya (small bottle) and a can. Although some

substance was found inside the kuppiya (small bottle) this

was not sent to the Government Analyst. The substance

found in the kuppiya was suppressed from court. This

attacts the presumption under Section 114(f) of the Evidence

Ordinance which is as follows: Court may presume that

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evidence which could be and is not produced would if

produced, be unfavourable to the person who withholds it.”

When I consider all these matters, I hold that the substance

found in the kuppiya was suppressed from court because it

was unfavourable to the prosecution.

**Possibility of the deceased committing suicide must be**

**excluded**

As I pointed out earlier the small bottle (kuppiya) was not

sent to the Government Analyst. Substance found inside the

small bottle (kuppiya) was suppressed from court. Although

the can was produced as P2 the small bottle (kuppiya) was

not produced in court. At this stage it is pertinent to consider

the evidence of Dr. Alwis who conducted the PME. He was

unable to say that the death was due to strangulation since

the internal organs of the neck were not present. He however

through his experience says that it was probable that she had

been strangled to death. But he says he can’t give a defnite

opinion (page 190 of the brief). Doctor in his post mortem

report says that there were no injuries caused by intention-

al violence with weapons. Doctor was not questioned about

suicide. A kuppiya (small bottle) was found with a plastic

cup near the dead body. PS Wijesinghe was unable to say

anything about the substance found in the kuppiya (small

bottle). The said kuppiya was not sent to the Government

Analyst. Under these circumstances it was necessary for the

prosecution to exclude the possibility of suicide. Failure to

exclude this possibility creates a reasonable doubt in the

prosecution case. The above facts are compatible with the

innocence of the appellant and are not consistent with his

guilt. Therefore the appellant should be acquitted.

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**Law relating to cases of circumstantial evidence**

In the case of *King Vs Abeywickrama (supra)* Soertsz J

remarked as follows. “In order to base a conviction on circum-

stantial evidence the jury must be satisfed that the evidence

was consistent with the guilt of the accused and inconsistent

with any reasonable hypothesis of his innocence”.

In *King Vs Appuham*y(5) Keuneman J held that “in order

to justify the inference of guilty from purely circumstantial

evidence, the inculpatory facts must be incompatible with the

innocence of the accused and incapable of explanation upon

any other reasonable hupothesis than that of his guilt”

In *Podisingho Vs King Dias* J *(supra)* held that “in a

case of circumstantial evidence it is the duty of the trial

Judge to tell the jury that such evidence must be totally

inconsistent with the innocence of the accused and must

only be consistent with his guilt”

In *Emperor Vs Browning*(5) court held “the jury must

decide whether the facts proved exclude the possibility that the

act was done by some other person, and if they have doubts,

the prisoner must have the benefts of those doubts.”

*Don Sunny Vs AG*(6)

“The accused-appellant and two others were indicted

on the frst count with having between 1.9.86 and 27.2.87

committed conspiracy to commit murder by causing the

death of Amarapala with one G. and others under Section

113(8) and Section 102 Penal Code and on the second count

having committed murder by causing the death of the said

Amarapala on 27.2.87 under Section 296 Penal Code. After

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trial the accused-appellant and the absent-accused were

convicted and sentenced to death.

**Held:**

1. When a charge is sought to be proved by circumstan-

tial evidence the proved items of circumstantial evidence

when taken together must irresistibly point towards the

only inference that the accused committed the offence.

 On a consideration of all the evidence the only inference

that can be arrived at should be consistent with the guilt

of the accused only.

2. If on a consideration of the items of circumstantial

evidence if an inference can be drawn which is

consistent with the innocence of the accused, then one

cannot say that the charges have been proved beyond

reasonable doubt.

3. If upon a consideration of the proved items of circum-

stantial evidence the only inference that can be drawn is

that the accused committed the offence then they can be

found guilty.

 The prosecution must prove that no one else other than

the accused had the opportunity of committing the

offence, the accused can be found guilty only and only if

the proved items of circumstantial evidence is consistent

with their guilt and inconsistent with their innocence.”

Applying the principles laid down in the above judicial

decisions, I hold that in a case of circumstantial evidence

if proved facts are consistent with the innocence of the

accused, he must be acquitted. Further if the proved facts

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are not consistent with the guilt of the accused, he must be

acquitted. I have earlier pointed out that some proved facts

are consistent with the innocence of the accused and also

not consistent with the guilt of the accused. Therefore the

appellant should be acquitted.

In my view, in a case of circumstantial evidence, if an

inference of guilt is to be drawn such inference must be the

one and only irresistible and inescapable inference. When I

consider the facts of this case, can I draw such an inference?

I say no.

For the aforementioned reasons, I hold the prosecu-

tion has not proved the charge against the appellant beyond

reasonable doubt. I therefore set aside the conviction and the

sentence and acquit the appellant of the charge with which

he was convicted.

**SiLva J.** - I agree.

**LecamwaSam J.** -I agree.

*Appeal allowed.*

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**WANIGASINGHE vS. JAYARATNE**

COUrT OF APPEAL

BASNAyAKE.J

CHITrASIrI.J

CALA 294/005 (LG)

DC RATnAPuRA 18166/MR

OCTOBEr 15, 2009

MAy 11, 2010

JULy 26, 2010

***Civil Procedure Code - Section 146 - Raising of Issues - Is it***

***restricted to the pleading? - Pure questions of law - Should Court***

***accept such issues?***

The trial Judge permitted the defendant to raise an issue though there

was no averment found to that effect in the pleadings fled. The plaintiff

sought and obtained leave.

It was contended that the defendant cannot raise the issue in the

manner suggested unless the answer is amended to include the matters

raised therein.

**Held:**

(1) Plain reading of Section 146 does not impose a blanket prohibi-

tion to frame issues on the matters that have not been averred

in the pleadings fled in the case. The object of the legislature in

having Section 146 had been to allow the issues on which the right

decision of the case appears to the Court to depend.

Per Chitrasiri.J

 “Line of authorities permit a trial Judge to allow an issue to be

raised though the matters contained therein had not been pleaded

when justice demands it and also to arrive at the right decision of

the case at the same time while adhering to the said position of

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the law, Courts have repeatedly held that issues cannot be raised

preventing the opposing party being taken up by surprise of the

facts raised in the case”.

(2) In the instant case the defendant was fully aware of the contents of

the agreement in issue therefore the matter that was raised viz the

alleged penal clause was within the knowledge of the defendant

even before fling of this action. There is no element of surprise.

(3) It is clear that, the matters raised are pure question of law. Court

should accept issues concerning pure questions of law though

such matters are not pleaded.

**an aPPLication** for leave to appeal from an order of the District Court

of ratnapura with leave being granted.

**cases referred to:-**

*1. Silinduhamy vs. Weerapperuma* 56 nLR 182 at 196

*2. Jayawardane vs. Amerasuriya* 20 nLR 289

*3. Silva vs. Obeysekera* 24 nLR 97

*4. Brampy Appuhamy vs. Gunasekara* 50 NLr 253

*5. Marfer vs. Thenuwara* 70 nLR 332

*6. De Alwis vs. De Alwis* 76 nLR 444

*7. Gnanarathan vs. Premawardane 1999* 3 Sri Lr 301

*8. Ranasinghe vs. Somawathie and others 2004* 2 Sri Lr 159

*9. Candappa vs. Ponnambalampillai BALJ* 1994 Vol 5 Part 2

- page 3

*10. A.G. vs. Smith* 8 nLR 241

*11. Mackinnon Mackenzie & Co vs. Grindlays Bank Ltd 1982* - 2 Sri Lr

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*12. Nadarajah vs. Ramesh 1991* 1 Sri Lr 240

*13. Hameed vs. Cassim* 1992 2 Sri Lr

*14. Lanka Orient Leasing Company Ltd vs. Ali and another 1999* - 3 Sri

Lr 109

*15. Herath vs. Jayasinghe* BALJ 2008 page 93

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*Navin Marapana* with *Nishanthi Mendis* for plaintiff-petitioner

*M.V.M. Ali Sabry* with *Shamith Fernando* for defendant-respondent.

December 09th 2010

**cHitRaSiRi, J.**

Plaintiff-petitioner (hereinafter referred to as the plaintiff)

fled this application seeking to set aside an order made by the

learned Additional District Judge of ratnapura which is dated

14thJuly 2005. On that day being the date of the commencement

of the trial learned Additional District Judge, having considered

the submissions of both parties, made order accepting an

issue suggested by the defendant-respondent. (hereinaf-

ter referred to as the defendant) The issue so accepted was

numbered as 10 (we) and it reads thus:

— w me 2 orK .súiqfï 7 jk fldkafoaish wmeyeÈ,s (Vague) ' ' '@

wd tu fldkafoaish 1997 wxl 26 orK widOdrK .súiqï ' ' ' '@

we tu fldkafoais oKavk j.ka;shlao@˜

Being aggrieved by the said order of the learned Judge,

plaintiff fled this application and moved that leave be granted

to proceed with the same. Consequently, this Court granted

leave and the matter was then fxed for argument. Thereafter,

both Counsel made their submissions on the matter.

Learned Counsel for the plaintiff argued that the afore-

said issue raised by the respondent should not have been

accepted by Court since no averments are found to that effect

in the pleadings fled. He also submitted that it would lead to

change the scope of the defence, taken up by the defendant

in the event the said issue is accepted. Learned Counsel for

*Wanigasinghe Vs. Jayaratne*

CA *(Chitrasiri, J.)* 261

the plaintiff also contended that the defendant cannot raise

the issue in the manner it is suggested unless the answer is

amended to include the matters raised therein.

As it concerns raising an issue, I will frst refer to Section

146 of the Civil Procedure Code which is the section relevant

to framing and acceptance of issues in a civil suit. It reads

thus:

 *“146(1) On the day fxed for hearing of the action, or on*

*any other day to which the hearing is adjourned, if the*

*parties are agreed as to the question of fact or law to be*

*decided between them, they may state the same in the*

*form of an issue, and the court shall proceed to determine*

*the same.*

 *(1) If the parties, however, are not so agreed, the court*

*shall, upon the allegation made in the plaint, or in*

*answer to interrogatories delivered in the action, or*

*upon the contents of documents produced by either*

*party, and after such examination of the parties as*

*may appear necessary, ascertain upon what material*

*propositions of fact or law the parties are at variance,*

*and that thereupon proceed to record the issues on*

*which the right decision of the case appears to the*

*court to depend.*

 *(2) Nothing in this section requires the court to frame and*

*record issues when the defendant makes no defence.*

Aforesaid section requires Judges to record issues of facts

or of law in order to arrive at the right decision of the dispute

before Court when the parties to the action are at variance to

such facts or law. Plain reading of the section too does not

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impose a blanket prohibition to frame issues on the matters

that have not been averred in the pleadings fled in the case.

Hence, it is clear that basically the object of the legislature in

having the aforesaid section 146 in the Civil Procedure Code

had been to allow the issues on which the right decision of

the case appears to the Court to depend.

However, the Courts in this country have highlighted the

importance of framing issues restricting to the matters that

have been averred in the pleadings fled in the case since

such an attitude may prevent the opposing party being taken

up by surprise of the facts raised in an issue. This position

is very well embodied in our law and a bundle of authorities

also are available to support this proposition.

In the early case of *Silinduhamy Vs. Weeraperuma*(1) Court

disallowing an application to frame an issue on the question

of “res judicata” had stated:

“I would refer to the two principles which must govern

this matter. One is that a judgment of a Court of compe-

tent jurisdiction directly upon the point in dispute is a bar

between the same parties or those claiming through them if

pleaded; but if not so pleaded, the matter is left at large.”

In the cases of *Jayawickrema v. Amarasuriya*(2), *Silva*

*v. Obeysekera(3) Brampy Appuhamy v. Gunasekara*(4), *Mar-*

*tin v. Thenuwara*(5), *De Alwis v. De Alwis*(6), *Gnanaathan v.*

*Premawardane*(7) it had been repeatedly held that issues

which are not strictly arisen out of the pleadings should

not be permitted to be raised. In a recent decision made in

the case of *Ranasinghe v. Somawathie and others*(8) it was

held that a party will not be entitled to raise an issue on an

unpleaded defence, if it would materially change the

complexion of the case placed on record by that party.

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Also, in *Candappa v Ponnambalampillai* (9) it was held

that:

“the case enunciated by a party must reasonably accord

with its pleadings. No party can be allowed to make at the

trial a case materially different from that which he has placed

on record and which his opponent is prepared to meet.”

Having discussed the aforesaid position in law, I will now

turn to the way in which the Courts in this country have

looked at the issue when the matters raised in an issue had

not been pleaded.

In the case of *Silva Vs. Obeysekara (supra)* at 107,

Bertram C.J. held:

 *“Counsel for the plaintiff raised objection that these*

*issues did not arise on the pleadings and that the*

*defendant should have got his answer amended so as to*

*raise the issues. On this objection being taken the learned*

*District Judge disallowed the issues. Here the learned*

*Judge was certainly led into a mistake. No doubt it is a*

*matter within the discretion of the Judge whether he will*

*allow fresh issues to be formulated after the trial has*

*commenced. But he should do so when such a course*

*appears to be in the interest of justice, and it is certainly*

*not a valid objection to such a course being taken that they*

*do not arise on the pleadings”.*

Also, in the early case of *Attorney General Vs. Smith*(10) it

was held that the issues need not be confned to the plead-

ings. This principle had been followed in *Mackinon Mack-*

*enzie & Co Vs. Grindlays Bank Limited*(11) and *Nadarajah*

*Vs. Daniel*(12) as well. In the case of *Hameed Vs. Cassim*(13)

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ranaraja J held:

 *“if it is not necessary that a new issue should arise in the*

*pleadings. The only restriction is that they urge in framing*

*a new issue should act in the interest of justice.”*

In the case of *Lanka Orient Leasing Company Ltd Vs. Ali*

*and Another*(14) it was held thus:

 *“1. The arbitration agreement was part and parcel of the*

*plaint.*

 *2. The amendment is a necessary amendment on which*

*the right decision of the case appears to depend …..*

 *The agreement being part and parcel of the plaint even*

*without an amendment of the answer an issue could have*

*been raised at the trial under section 146(2) of the Civil*

*Procedure Code, according to which, “where parties are*

*not agreed as to questions of fact or of law to be decided*

*between them, the Court shall upon the allegation made*

*in the plaint, or in answer to interrogatories delivered in*

*the action, or upon the contents of documents produced*

*by either party … … … proceed to record the issues on*

*which the right decision of the case appears to the court to*

*depend.”*

Moreover, in the case of *Herath Vs Jayasinghe*(15) where an

issue as to the presence of a trust that had not been pleaded;

it was held that:

 *“issues are not restricted to pleadings and an issue may*

*be raised even after the commencement of the trial, if such*

*a course appears to be in the interest of justice and neces-*

*sary for the right decision of the case.”*

In the circumstances, it is evident that the line of

authorities permits a trial Judge to allow an issue to be raised

*Wanigasinghe Vs. Jayaratne*

CA *(Chitrasiri, J.)* 265

though the matters contained therein had not been pleaded

when justice demands it and also to arrive at the decision of

the case. As mentioned herein before even the Section 146 of

the Civil Procedure Code envisages allowing an issue ensuring

the right decision of the case. At the same time, while adhering

to the said position of law, courts have repeatedly held that

the issues cannot be raised preventing the opposing party

being taken up by surprise of the facts raised in the issue.

However in doing so, trial judges should consider all the

circumstances of the case in order to avoid any surprise to

the opposing parties that would take away their opportunity

to reply to those matters.

However, it must also be noted that the **issues raised to**

**determine a pure question of law should be accepted even**

**if those matters have not been specifcally pleaded.** Such

a rule has to be in place as no one is allowed to overlook the

law of the land merely because such a matter had not been

mentioned in the pleadings.

I will now examine the matter that is being argued in this

instance. Admittedly, the matters raised in the issue that had

been accepted in the impugned order had not been pleaded.

Contention of the plaintiff is that the issue 10 (we) should not

be accepted as the matters referred to therein had not been

pleaded by the defendant. The said issue 10 (we) concerns

a question of a penal clause namely Clause 7 (we) of the

agreement marked P2 contained in the agreement put in

suit.

The said agreements put in suit marked P1 and P2

had been fled with the plaint and the defendant also is a

party to the said two agreements. Hence, it is clear that the

defendant was fully aware of the contents of the agreements

and therefore the matter that was raised in the issue 10 (we)

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namely the alleged penal clause was within the knowledge

of the defendant even before the fling of this action. Hence,

it is clear that there had not been an element of surprise as

far as the defendant is concerned when it comes to the facts

referred to in the issue in question.

The issue also poses the question whether the clause 7(we)

in the agreement marked P2 would amount to a penal clause.

Then again the question arises whether the action fled in the

district Court being an action to claim damages for violation

of the terms of the agreements put in suit, could the plaintiff

claim penal damages along with liquidated damages.

It is clear that such a matter is a pure question of law.

As I have mentioned before, Court should accept issues

concerning pure questions of law though such matters have

not been pleaded. If such a question of law is not determined

due to not pleading the same, it would allow the Court to

disregard the positive rules of law when determining the

issues of the case. Such an attitude will certainly not mete

out the justice.

In the circumstances, it is my considered view that the

plaintiff had suffcient knowledge as to the facts contained

in issue No.10 (we) and also it is necessary to have same as

an issue, more specifcally in the interest of justice. Hence

I am not inclined to interfere with the decision of the learned

District Judge who accepted the said issue.

For the aforesaid reasons this appeal is dismissed with

costs.

**eRic BaSnaYaKe, J.** - I agree.

*Appeal dismissed.*

*Pannipitiya vs. Attorney General*

CA 267

**PANNIPITIYA vS. ATTORNEY GENERAL**

COUrT OF APPEAL

SISIrA DE ABrEW J

UPALy ABEyrATHNE J

CA 260 - 262/2009

MC GAMPAHA B/400/2009

JUNE 1,3,6,2009.

***Antiquities Ordinance as amended by Act 24 of 1998 - Section 15C***

***- Bail Act 3 of 1997 - Section 3 (1), Section 7 g - Code of Criminal***

***Procedure Act 15 of 1979 – Immigrants and Emigrants Act 20***

***of 1948 – 31 of 2006 – Section 45, Section 47(1) – Prevention of***

***Terrorism (Temporary Provisions) Act 48 of 1979 – Do the provi-***

***sions of the Bail Act apply to persons charged under Antiquities***

***Ordinance – Constitution - Article 13(2) Article 80 (3), Article 126***

Three accused who were taken into custody on an allegation that they

committed offences under the Antiquities Ordinance sought bail. The

application was made under Section 7 of the Bail Act.

**Held:**

(1) On a careful consideration of Section 3 of the Bail Act it is

clear that the Bail Act does not apply to any person accused or

suspected of having committed or convicted of an offence under

 (1) The Prevention of Terrorism (Temporary Provisions) Act 48 of

1979

 (2) regulations made under the Public Security Ordinance

 (3) Any other written law which makes express provisions in

respect of the reliance on bail of persons accused or suspected

of having committed or convicted of offences under such other

written law.

(2) Section 15 (c) of the Antiquities Ordinance makes express

provisions in respect of the release on bail of persons charged

with or accused of offences under the said Ordinance. The

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persons charged with or accused of offences under the Antiquities

Ordinance are covered under the 3rd category above - Provisions

of the Bail Act do not therefore apply to a person charged with or

accused of offences under the Antiquities Ordinance.

**aPPLication** for bail under the Bail Act.

**cases referred to:**

*(1) AG vs. Sumathipala* 2006 2 Sri Lr 126

*(2) Sumanadasa vs. AG* 2006 3 Sri Lr 202

*Wijedasa Rajapakse PC* with *Luxman Livera* and *Nimal Rajapakse* for

the petitioner.

*Rajinda Jayarathne SC for AG.*

June 19th 2010

**SiSiRa de aBRew J.**

This is an application for bail to release suspects taken

into custody on an allegation that they committed offences

under Antiquities Ordinance as amended by Act No.24 of

1998.

Learned President’s Counsel (P.C) for the petitioner was

directed by this court to support the application after serv-

ing notice on the Attorney General. We have heard submis-

sion of both Counsel. The important question that must be

decided is whether this court has jurisdiction to release

the said suspect on bail in view of Section 15C of the said

Ordinance which is as follows;

“Notwithstanding anything to the contrary in the Code of

Criminal Procedure Act no.15 of 1979 or any other written

law, no person charged with, or accused of an offence under

this Ordinance shall be released on bail.”

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Section 47(1) of the Immigrants and Emigrants Act

no. 20 of 1948 (before enactment of Act no.31 of 2006)

which is somewhat similar to Section 15C of the Antiquities

Ordinance was interpreted by a bench of fve judges of the

Supreme Court in *A.G Vs Sumathipala*(1) Section 47(1) of the

Immigrants and Emigrants Act before the enactment of Act

No 31 of 2006 is as follows:

*“Notwithstanding anything in other written law-*

*(a) every offence under paragraph (a) of sub – section (1) of*

*section 45;*

*(b) every offence under sub-section (2) of section 45 in so*

*far as it relates to paragraph (a) of sub-section (1) of that*

*section;*

*(c) ……………….*

*(d) ……………….*

*(e) ……………….*

*shall be non-bailable and no person accused of such an*

*offence shall in any circumstances be admitted to bail.”*

Supreme Court In *A.G Vs Sumathipala (supra)* held

thus:

“Section 47(1) Immigrants and Emigrants Act prohibited

bail pending trial to a person charged with an offence under

section 45 of that Act, and particularly in view of Article 80(3)

of the Constitution, even the Supreme Court had no power

to grant bail prohibited by the plain words of section 47(1) of

the Immigrants and Emigrants Act. It is for the Parliament

to amend the law, if it is too harsh.” After this judgment a

bench of three judges of the Supreme Court in a fundamen-

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tal rights case considered whether persons charged with or

accused of offences under the Immigrants and Emigrants Act

could be continuously detained in the custody of remand.

Petitioners in the said case alleged an infringement of

their fundamental rights guaranteed by article 13 (2) of the

Constitution resulting from continuous detention in custody

without any recourse to a remedy under any procedure

established by law. Lord Chief Justice held: “We accordingly

hold that the fundamental right of the petitioners guaranteed

by Article 13(2) of the Constitution have been infringed by

executive and administrative action, since the petitioners

have been detained in custody merely upon their being pro-

duced in Court and incarcerated without a remedy until the

conclusion of their trials. On the basis of the fndings stated

above the respective Magistrate Courts are directed to

decide on the continued detention of these persons in

accordance with the procedure applicable to persons

accused of non-bailable offences.” *Vide V. Sumanadas Vs A.G*(2)

decided on 19.6.2006.

It is therefore seen in the above case the Supreme Court

directed the Magistrate to decide on bail on the basis that the

fundamental rights of the petitioner have been violated. Under

Article 126 of the Constitution it is the Supreme Court which

has sole and exclusive jurisdiction to hear and determine any

question relating to the infringement of fundamental rights.

This Court has no jurisdiction to hear and determine whether

the fundamental rights of the suspects have been violated or

not. Considering all these matters I hold that this Court has

no jurisdiction to release a suspect charged with or accused

of an offence under the Antiquities Ordinance.

Learned P.C next contended that the petitioner had come

under Section 7 of the Bail Act no.30 of 1997. In my view if

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CA *(Sisira de Abrew J.)* 271

the Court has no jurisdiction to grant bail such application

whether it comes under the Bail Act or not cannot be consid-

ered by Court. Although the learned P.C contended that the

petitioner’s application could be considered under Section 7

of the Bail Act, I am unable to agree with his contention for

the following reasons.

Section 3(1) of the Bail Act reads as follows:

*Nothing in this Act shall apply to any person accused or*

*suspected of having committed, or convicted of, an offence*

*under, the Prevention of Terrorism (Temporary Provisions)*

*Act, No. 48 of 1979, Regulation made under the Public*

*Security Ordinance or any other written law which makes*

*express provision in respect of the release on bail of persons*

*accused or suspected of having committed, or convicted of,*

*offences under such other written law.”*

On a careful consideration of section 3 of the Bail Act it is

clear that the Bail Act does not apply to any person accused

or suspected of having committed or convicted of an offence

under

1. The Prevention of Terrorism (Temporary Provisions) Act

no.48 of 1979.

2. regulations made under the Public Security Ordinance.

3. Any other written law which makes express provisions

in respect of the release on bail of persons accused or

suspected of having committed or convicted of offences

under such other written law.

Section 15C of t he Antiquities Ordinance makes express

provisions in respect of the release on bail of persons charged

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with or accused of offences under the said Ordinance. There-

fore persons charged with or accused of offences under the

Antiquities Ordinance are covered under the 3rd category

above. I therefore hold that the provisions of the Bail Act

do not apply to persons charged with or accused of offences

under the Antiquities Ordinance,

For the aforementioned reason, I dismiss the petition of

the petitioner and refuse to issue notice on the respondents.

**aBeYRatHne J.** - I agree.

*Petition dismissed.*

*Fernando v. Gamlath*

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**FERNANDO v. GAMLATH**

SUPrEME COUrT

J.A.N. DE SILVA, CJ.

EKANAyAKA, J. AND

SUrESH CHANDrA, J.

S.C. APPEAL NO. S.C.(CHC) 04/2001

C.H.C. NO. 12/96(3)

FEBrUAry 10TH, 2011

***Code of Intellectual Property Act (No. 52 of 1979) – Section 10 –***

***The author of a protected work shall have the exclusive right to***

***do or authorize any person to reproduce the work, make transla-***

***tions, adaptation, arrangement or other transformation of work***

***or communicate the work to the public – Section 19(1) – The rights***

***referred to in Section 10 shall be protected during the life time of***

***the author and for ffty years after his death. – Law relating to***

***the trademarks and passing off***

The Plaintiff was the widow of the late Mr. C.T. Fernando, who had

done musical compositions for the song “Pinsiduwanne” and was its

singer as well. The Defendant had included the said song in a teledrama

without the permission of the Plaintiff and had telecast it for commer-

cial purpose. The Plaintiff claimed intellectual property rights to the

tune of the said song and averred that the Defendant had breached the

Plaintiff’s intellectual property rights. The Defendant whilst denying the

breach of the Plaintiff’s rights had also stated that the Plaintiff did not

have rights to the said song as the Defendant had taken the said song

from a textbook published by the Educational Publishing Department

in 1993.

After trial the learned High Court Judge held that the composition

of the said song was that of late C.T. Fernando and the Plaintiff had

acquired such rights of the late C.T. Fernando. But went on to hold that

the Defendant had not infringed the rights of the Plaintiff and proceeded

to dismiss other claims of the Plaintiff.

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**Held :**

(1) When an Artiste has achieved a reputation, the rights acquired

which according to law can be inherited and the works of such

reputed Artiste, such as singers can be used by others only by

obtaining permission from the original artiste or from those who

inherit such rights which amounts to a recognition of the fame

and reputation of the original singer.

(2) Use of the said musical composition by the Defendant without the

permission from the Plaintiff was an infringement of the rights of

the Plaintiff regarding the composition, by the Defendant.

**aPPeaL** from the judgment of the Commercial High Court, of Colombo.

**cases referred to:**

*(1) University of London Press V. University Tutorial Press –* (1916) 2 Ch

601

*(2) Sawkins V. Hyperian Records* (2005) EWCA Civ 565

*(3) Walter V. Cane –* (1900) AC 539

*(4) Designer’s Guild V. Russel Williams –* (2000) uKHL 58

*(5) Francis Day & Hunter V. Bron* – (1963) Ch 587

*(6) Competti Records v. Warner Music –* (2003) E W C h 1274 (Ch)

*Mahinda Ralapanawa* with *Chandima Gamage* for the Plaintiff –

Appellant

*Sumedha Mahawanniarachchi* for the Defendant – respondent

*Cur.adv.vult*

May 06th 2011

**SuReSH cHandRa J,**

This is an appeal from the judgment of The Commercial

High Court, Colombo in respect of an appeal fled by the

Plaintiff.

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SC *(Suresh Chandra J,)* 275

The Plaintiff in her Plaint fled in the District Court of

Colombo which was later transferred to the Commercial

High Court, Colombo averred that her husband was the late

Mr. C.T. Fernando that the said Mr. C.T. Fernando, had done

a musical composition for the song “Pinsuduwanne” and was

its singer as well. The Defendant had included the said song

in a teledrama titled “Mal Kekulak” without the Plaintiffs

permission and had telecast it for a commercial purpose. The

Plaintiff claimed the intellectual property rights to the “tune”

of the said song as the widow of late Mr. C.T. Fernando in

terms of Section 19(1) of the Code of Intellectual Property Act

no. 52 of 1979 and averred that the Defendant had breached

the Plaintiffs rights under the Code of Intellectual Property.

She prayed for a declaration to the effect that the tune of

the said song was composed by her late husband Mr. C.T.

Fernando, for an order that the Defendant had breached the

Plaintiffs’ rights under the said code, and had also distorted

the tune of the said song and thereby breached section 11(b)

of the Code of Intellectual Property Act, for damages in the

sum of rs. 25,000/= for violating the Plaintiffs rights under

the said Code, for an order in the sum of rs. 25,000/= against

the Defendant for unjustly enriching himself by violating the

Plaintiffs rights under the said Code. The Defendant fled

answer denying the breach of the Plaintiffs rights and stated

further that the Plaintiff did not have rights to the said song

and that he had taken the song from the textbook published

by the Educational Publishing Department in 1993.

After trial the Learned High Court Judge held that the

composition of the said song was that of late Mr. C.T. Fernando

and that the Plaintiff acquired the rights of the late Mr. C.T.

Fernando in terms of the Code of Intellectual Property Act

and further that the Defendant included the said song in

the teledrama without the Plaintiffs permission. However the

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Learned High Court Judge went on to hold that the Defendant

had not infringed the rights of the Plaintiff and proceeded to

reject the other claims of the Plaintiff.

In the Appeal fled before this Court both parties had

fled written submissions but when the matter was taken

up for argument on 10th February 2011 the Defendant was

absent and unrepresented and the Court proceeded to hear the

appeal.

r.G. McKerron Q.C., in The Law of Delict referring to the

position relating to “passing off” under the roman Dutch Law

states that-

“A person may be restrained from selling his goods by the

same name as that of the Plaintiff, or any colourable imitation

thereof. But a restraint will not be imposed in respect of goods

which are not the same kind as those of the Plaintiff. Nor will

protection be afforded to a *peregrines* who is not carrying on

business, or whose goods are not sold on the market, within

the jurisdiction in which he seeks relief; for to entitle the

plaintiff to an interdict he must show that he has ‘a right of

property in regard to his name or goods within the jurisdic-

tion of the court”.

A parallel could be drawn to this instant case which deals

with the use of the composition of the song that the Plaintiff

has complained of. It certainly would be a case comparable to

a case of “passing off”.

The law relating to the trademarks and passing off was

governed by the Trademarks Ordinance No. 15 of 1925 which

used the above principles based on the law of Delict. The law

in relation to trademarks, passing off and copyright is now

governed by the Code of Intellectual Property Act No 52 of

1979.

*Fernando v. Gamlath*

SC *(Suresh Chandra J,)* 277

Section 19(1) of the Code of Intellectual Property Act No.

52 of 1979 states that –

*“Unless expressly provided otherwise in this Part, the*

*rights referred to in section 10 shall be protected during the life*

*of the author and for ffty years after his death.”*

Section 10 of the Code of Intellectual Property Act No. 52

of 1979 states that –

*“Subject to the provisions of sections 12 to 16 the author*

*of a protected work shall have the exclusive right to do or*

*authorize any other person to do the following acts in relation*

*to the whole work or a part thereof-*

*(a) reproduce the work;*

*(b) make a translation, adaptation, arrangement, or other*

*transformation of the work;*

*(c) communicate the work to the public by performance, broad-*

*casting, television or any other means.”*

In the English Law copyright protection will only subsist

for works which are considered to be ‘original’ works. The test

to consider whether a work is original was laid down in the

case of *University of London Press v University Tutorial Press* (1)

where Peterson J held that

 “The word ‘original’ does not in this connection mean that

the work must be the expression of original or inventive

thought. Copyright Acts are not concerned with the origi-

nality of ideas, but with the expression of thought … But

the Act does not require that the expression must be in

an original or novel form, but that the work must not be

copied from another work – that it should originate from

the author.”

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He further pointed out the much used principle in

English Law which is that , “what is worth copying is prima

facie worth protecting”.

In the case of S*awkins v Hyperion Records*(2) the claim-

ant a musicologist had prepared performing editions based

upon works of Lalande, a French composer at the courts

of King Louis XIV and King Louis XV. The existing sources

of Lalande’s music were not in a form that could be played

by an orchestra, and to make it possible to perform the

music the claimant had to transpose the source material

into conventional modern notation, make extensive correc-

tions, and complete several missing sections, all of which

involved a great level of skill, labour and judgment. However,

the claimant did not compose a single new note of music.

In the judgment of the Court of Appeal, Mummery LJ held

that on the application of the principle laid down in *Walter*

*v Lane*(3), the effort, skill and time which the claimant

had spent in making the performing editions were suffcient

to satisfy the requirement that they should be “original”

works in the copyright sense. Jacob LJ further held that

the required question that needed to be asked when con-

sidering originality was whether “what the copyist did went

beyond mere servile copying?” It was held in the Hyperion

records case that there was more than mere servile copying

as the Claimant’s work had the practical value of making the

original work playable and that the work of the Claimant had

suffcient aural and musical signifcance to attract copyright

protection.

When considering infringement of copyright the courts

would need to look at the similarities between the works.

In the case of *Designers’ Guild v Russell Williams*(4) which

considered an artistic work Lord Millett held that

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 “An action for infringement of artistic copyright, however,

is very different. It is not concerned with the appearance

of the defendant’s work but with its derivation. The copy-

right owner does not complain that the defendant’s work

resembles his. His complaint is that the defendant has

copied all or a substantial part of the copyright work …

Even where the copying is exact the defendant may in-

corporate the copied features into a larger work much

and perhaps most of which is original or derived from

other sources. But while the copied features must be a

substantial part of the copyright work, they need not form

a substantial part of the defendant’s work … Thus the

overall appearance of the defendant’s work may be very

different from the copyright work. But it does not follow

that the defendant’s work does not infringe the plaintiff’s

copyright.”

 “The frst step in an action for infringement of artistic

copyright is to identify those features of the defendant’s

design which the plaintiff alleges have been copied from

the copyright work.”

 “… the inquiry is directed to the similarities rather than

the differences. This is not to say that the differences are

unimportant. They may indicate an independent source

and so rebut any inference of copying, but differences in

the overall appearance of the two works due to the pres-

ence of features of the defendant’s work about which no

complaint is made are not material”

In the case of *Francis Day & Hunter v Bron*(5) the

Claimant who was the composer of the musical work “In

a Little Spanish Town” claimed that the frst eight bars of

the claimant’s musical work had been copied in the frst

eight bars of the defendant’s musical work named “Why”.

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Willmer LJ held that the composer had used some of

“the commonest tricks of composition,” and which were

furthermore “exactly the sort to be expected from the

composer of a popular song.” Willmer LJ referred to the fact

that the opening bar of the claimant’s work was a common-

place series found in other previous musical compositions,

which had then been developed over the remainder of the

frst eight bars of the musical work.

When considering the moral rights such as the right

to object to the derogatory treatment of a work the main

issue would be to consider whether there has been evidence

put forward to the court to be able to consider whether a

distortion or a mutilation of the work has occurred which has

caused the author dishonor or disrepute.

In the case of *Competti Records v Warner Music*(6) the third

claimant composed a garage track entitled “Burnin,” which

consisted of an insistent instrumental beat accompanied

by the vocal repetition of the word “burning” or variants

of it. The defendant, a leading UK garage track, released a

version of the track “Burnin” with the addition of a rap line.

The claimant alleged that the rap was a derogatory treat-

ment of his work because it allegedly included reference to

drugs and violence. It was accepted by the Defendant that the

addition of the rap line was a “treatment” of the work, and the

issue was whether the treatment was “derogatory.”

The court held that according to the Copyright Act of

United Kingdom, distortion or mutilation is only derogatory

if it is prejudicial to the author’s honour or reputation. The

judge held that the fundamental weakness in the case was

that there was no evidence about the author’s honour or

reputation, or of any prejudice to either of them.